COPY

Office-Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-732

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THEODORE CLEAVINGER, MARVIN MARCADIS, and TOM P. LOCKETT,
Petitioners,

v.

DAVID SAXNER and ALFRED CAIN, JR.,
Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

# AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex. rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL; and the STATES OF ALABAMA, HAWAII, and WYOMING

---

Attorneys for Amici Curiae State of California ex rel. John K. Van de Kamp, Attorney General

JOHN K. VAN DE KAMP
Attorney General
STEVE WHITE, Chief
Assistant Attorney General
ARNOLD O. OVEROYE
Assistant Attorney General
WILLIAM GEORGE PRAHL
Supervising Deputy
Attorney General
SUSAN J. ORTON
Counsel of Record
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5279

(Continued on inside cover)

27

CHARLES A. GRADDIT
Attorney General
State of Alabama

MICHAEL A. LILLY
Attorney General
State of Hawaii

A. G. McCLINTOCK
Attorney General
State of Wyoming

## QUESTION PRESENTED

Are prison disciplinary hearing officers protected by absolute immunity from 42 U.S.C. 1983 damages liability?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| INTEREST OF AMICI | 2 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT | |
| I PRISON DISCIPLINARY OFFICIALS PERFORM QUASIJUDICIAL FUNCTIONS WHICH CANNOT BE CARRIED OUT EFFECTIVELY IF THREATS OF DAMAGE SUITS ARE OMNIPRESENT | 5 |
| II ABSOLUTE IMMUNITY DOES NOT LESSEN ACCOUNTABILITY, BUT ENSURES ITS PROPER PLACE IN THE BALANCED PRISON DISCIPLINARY PROCESS | 11 |
| CONCLUSION | 18 |




## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Anderson v. Boyd (9th Cir. 1983) 714 F.2d 906 | 6 |
| Bradley v. Fisher (1872) 80 U.S. (13 Wall.) 646 | 18 |
| Butz v. Economou (1978) 438 U.S. 478 | 5,9 |
| Greene v. Zank (1984) 158 Cal.App.3d 497 | 8 |
| Haines v. Kerner (1972) 404, U.S. 519 | 11 |
| Harlow v. Fitzgerald (1982) 457 U.S. 800 | 10,11 |
| Hurst v. State of Wyoming Wyo. Sup.Ct. 84-159 (1985) | 6 |
| In re Jackson Cal. Supreme No. Crim. 24237 | 17 |
| Kissell v. Breskow (1978) 579 F.2d 425 | 8 |
| Martinez et al. v. California et al. (1980) 444 U.S. 277 | 5 |
| Saxner v. Benson (7th Cir. 1984) 727 F.2d 699 | 2,12 |
| Sellars v. Procunier (9th Cir. 1981) 641 F.2d 1295 | 6,16 |

TABLE OF AUTHORITIES (Contd.)


| | Page |
|---|---|
| Tagliavia v. County of Los Angeles (1980) 112 Cal.App.3d 759 | 8 |
| Taylor v. Mitzel (1978) 82 Cal.App.3d 665 | 8 |
| Trotter v. Klincar (7th Cir. 1984) 748 F.2d 1177 | 6 |
| Ward v. Johnson (4th Cir. 1982) 690 F.2d 1098 | 9 |
| Wolff v. McDonnell (1974) 418 U.S. 539 | 9 |


CONSTITUTIONS


| | |
|---|---|
| California Constitution Article 6, section 10 | 17 |
| New Jersey Constitution (1947) Article VI, section V, ¶ 4 | 17 |


STATUTES, REGULATIONS AND OTHER AUTHORITIES


| | |
|---|---|
| 42 U.S.C. 1983 | 18 |
| 42 U.S.C. 1997e | 12 |
| California Government Code | |
| section 19572 | 18 |
| section 19573 | 18 |
| California Penal Code | |
| section 1473 | 16-17 |





| | |
|---|---|
| California Administrative Code | |
| 15 Cal. Admin. Code section 3325 | 12 |
| 15 Cal. Admin. Code section 3328 | 13 |
| Ohio Administrative Code | |
| section 5120-9-09 | 16 |
| Illinois Rev. Statute | |
| Ch. 38, section 1003-6-3 | 15-16 |
| Ch. 38, section 1003-3-2(a)(4) | 16 |
| Nebraska Rev. Statute | |
| section 25-1901 | 17 |
| Annual Report of the Administrative Office of the United States Courts, 1984, | 3 |

No. 84-732

IN THE SUPREME COURT OF THE
UNITED STATES

---

OCTOBER TERM, 1984

---

THEODORE CLEAVINGER, MARVIN MARCADIS,
and TOM P. LOCKETT,

Petitioners,

v.

DAVID SAXNER and ALFRED CAIN, JR.

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

# AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex. rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL; and the STATES OF

ALABAMA, HAWAII, WYOMING

---

Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States. This brief is respectfully submitted in support of petitioners who urge reversal of Saxner v. Benson (7th Cir. 1984) 727 F.2d 669 (cert. granted 2/19/85).

INTEREST OF AMICI

At issue is the extent of immunity from 42 U.S.C. 1983 damage suits for state and federal officials who adjudicate formal prison disciplinary hearings.

Amici advise and represent state correctional officers who, like petitioners, are assigned to serve on prison disciplinary boards. The state prison disciplinary process closely parallels that of the federal system. Thus the functional and procedural due process considerations are identical. The litigious record of state inmates against state officers is even more voluminous than



the staggering numbers noted by the Solicitor General's petition for certiorari here. In the twelve-month period ending June 30, 1984, for example, petitions by state prisoners to district courts totalled 26,581. (Annual Report of the Administrative Office of the United States Courts, 1984, Table 24.)

The necessity of absolute quasi-judicial immunity is thus one of critical interest to amici. Accordingly, it is requested that the contentions of amici be considered in this case.

- - - - - -

## SUMMARY OF ARGUMENT

Amici urge reversal of the Seventh Circuit's unexplained, unsupported curtailment of immunity for prison disciplinary hearings officers. The functions of these officials are adjudicative, and they must have the absolute immunity enjoyed by persons who perform similar duties. Otherwise, an element of defensiveness will creep into their judgments.

Anything less than absolute immunity for these officials will also sprout disturbing ramifications for a federal judicial docket already loaded with a disproportionate weight of prisoner cases.

The procedures and formalities required under the Due Process clause compel performance of a quasi-judicial function. Concomitant immunity must be accorded as well.

- - - - - -



## ARGUMENT

### I

### PRISON DISCIPLINARY OFFICIALS PERFORM QUASIJUDICIAL FUNCTIONS WHICH CANNOT BE CARRIED OUT EFFECTIVELY IF THREATS OF DAMAGE SUITS ARE OMNIPRESENT

The proper approach to quasi-judicial absolute immunity claims is to test the functions and safeguards of the prison disciplinary process. This Court made that clear in Butz v. Economou, 438 U.S. 478 (1978).

The nature of the functions performed by prison disciplinary officers brings them squarely within that group of quasi-judicial functions which public policy considerations have already accorded absolute immunity from damages liability. For example, parole board members enjoy absolute immunity from damage suits. (Martinez, et al. v. California, et al., 444 U.S. 277,

1980, pet. for rehg. den. 1980; Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981); Anderson v. Boyd, 714 F.2d 906 (9th Cir. 1983); Trotter v. Klincar, 748 F.2d 1187 (7th Cir. 1984); see, also, Grimm v. Arizona Brd. of Pardons and Paroles, 564 P.2d 1227 (1977) and Hurst v. State of Wyoming (Wyo. Sup.Ct. 84-159 (1985).)

The public policy rationale for service on parole boards requires difficult judgments. Mistakes are inevitable and often disastrous. But absolute immunity from damages liability is essential if members are to serve with independence. The argument for parole board members is, however, less compelling than that for prison disciplinary officers. The judgment errors made by parole board members do not generate litigation by the person on whom they pass judgment, as do those of disciplinary officers. Litigation



over the release of a felon is typically brought by the victims of the felon's later crime -- or their survivors. To the extent that qualified immunity might hinder the officers' judgment, it would tend to influence them to deny parole. But the disciplinary officers' case for absolute immunity is even stronger: they must hear and decide matters which affect the inmates themselves, with knowledge that today's rule violator may well be tomorrow's civil rights plaintiff. Disciplinary board members thus present an even more compelling case for absolute immunity than parole board members whose immunity is already unquestioned.

Bar disciplinary committees immunity cases provide another excellent basis for a functional comparison. The adjudicative functions of the two groups are similar, as are the dynamics. Yet the Seventh Circuit found absolute immunity for the executive

secretary of Indiana's State Bar disciplinary committee. (Kissell v. Breskow, 579 F.2d 425 (1978); accord, Greene v. Zank (1984) 158 Cal.App.3d 497.)

The public policy rationale for absolute immunity by state bar disciplinary officials is also less compelling than that for prison disciplinary officers. Prison disciplinary officers necessarily make closer judgment calls on matters of more critical and immediate significance than do bar disciplinary officers.

Absolute quasi-judicial immunity has also been accorded administrative law judges and certain court functionaries, in the interest of their need for unfettered independence to make the judgments required by their jobs. (Tagliavia v. County of Los Angeles (1980) 112 Cal.App.3d 759; Taylor v. Mitzel (1978) 82 Cal.App.3d 665.)

The functions carried out by prison disciplinary officers are, by constitutional



mandate, even more formalized than the quasi-judicial function of parole boards, bar disciplinary committees, and other administrative officers. (Wolff v. McDonnell, 418 U.S. 539 (1974); see also Ward v. Johnson, 690 F.2d 1098, 1101-1104 (4th Cir. 1982). They must, therefore, be assured absolute immunity from damage suits by the inmates they judge. If officers assigned to serve as quasi-judges actually sit as future defendants and prospective judgment debtors, the process compelled by the Constitution will be so fundamentally modified as to defeat the very purpose of due process.

It has been suggested that officials' needs for independence can be adequately met by a qualified immunity which tests for good faith conformance to existing law. (See Butz v. Economou, supra, at p. 507-508.) Amici emphatically deny that the qualified immunity criteria are as

readily applicable as the Butz dictum suggests, for the reasons set forth below.

The criteria for qualified immunity were reformulated by this Court into a so-called "objective test" by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982). By that test, an official's judgment is reviewed to see if it constituted a good faith effort to conform to settled law. (Id. at pp. 818-819.)

Amici submit that this standard is unworkable in the context of civil rights litigation over prison disciplinary hearings. On motion for summary judgment, factual issues about the hearing procedures will frequently swarm around the affidavits and counteraffidavits. Even where they do not, the officials whose judgment must be independent to preserve impartiality will, instead, be conferring with counsel to present their defense against inmates they



have had to judge. What constitutes "settled law" is not always clear-cut. Moreover, the liberal rules for prisoner complaint interpretation are such that artful, although conclusory, invocation of the Harlow standard will suffice to defeat a motion for judgment on the pleadings (Haines v. Kerner, 404 U.S. 519 (1972)0. The officials defending against such complaints will thus have to defend themselves through the discovery phase which, whatever its cathartic effect upon inmates, taxes the defendants and destroys their independence to judge.

II

## ABSOLUTE IMMUNITY DOES NOT LESSEN ACCOUNTABILITY, BUT ENSURES ITS PROPER PLACE IN THE BALANCED PRISON DISCIPLINARY PROCESS

Absolute immunity for prison disciplinary officers does not remove accountability from the prison disciplinary process. It merely keeps it in its proper

place in that process. A brief review of the remedies available to an aggrieved inmate after disciplinary hearing will illustrate this point. California's 45,590 inmates, for example, may challenge prison disciplinary actions by administrative appeals[1] and, thereafter, in state habeas corpus actions. Federal civil rights equitable remedies are available as well.

California's experience, like that of the federal Bureau of Prisons, has demonstrated that the remedy of institutional review is not a hollow one. (Saxner v. Benson, supra, at p. 681.) In fiscal year 1983-84, for example, First Level or informal appeals from California disciplinary actions

1. 15 Cal. Admin. Code section 3325. The United States Attorney General's certification of minimum appeals standards will ensure a meaningful administrative appeals remedy nationwide. (42 U.S.C. 1997e.)



were taken by 2,446 inmates.[2] Relief or partial relief was granted at this level in 579, or approximately 23 percent, of those appeals. (California Department of Corrections Inmate/Parolee Appeals Quarterly Reports for F.Y. 83-84, First Level.)[3] Second Level appeals from disciplinary actions during that same period totalled 3,175, of which 601 or approximately 18.9 percent were granted or partially granted. (Id., Second Level Reports.)

2. 41,575 prison disciplinary hearings for serious rule violations were conducted in California in fiscal year 1983-84. 896 serious rule violations were taken to hearings at Folsom State Prison in the first quarter of 1985.

3. These remedies, of course, are in addition to the credit restoration which is guaranteed according to pre-set published formulas after designated "discipline-free" periods. (15 Cal. Admin. Code 3328.)

As an additional protection, third-level review in California is carried out by a professional appeals unit which is independent of all institutional hierarchies at the prisons. 1,412 appeals were brought to this level in fiscal year 1983-84 for formal reevaluation. After investigation, interviews, and a full review for compliance with all procedural requirements, including the "preponderance of the evidence" standard of proof, appeals were granted or partially granted in 238 cases, approximately 16.8 percent. (Id., Third Level Reports.)

Administrative remedies are thus demonstrably effective in California at the administrative level, where inmates with complaints about disciplinary actions can obtain post-hearing review by institutional and then statewide appeals units with a record of fairness and objectivity.



The State of Illinois, with approximately 16,000 inmates and 102,636 disciplinary actions in fiscal year 1984, offers another example of a workable system of administrative review. Illinois, like California, has a tri-level structure for review of disciplinary actions in its prisons. After discipline has been imposed, inmates may take grievances to an Institutional Inquiry Board at the prisons.

Further appeals may be taken by personal appearance or statement to the Administrative Review Board, made up of three persons from outside the prison, one of whom must be a public member.

A third level of review is available to Illinois inmates facing a loss of more than 30 days of "good conduct credit" in twelve months. That review is before the Prisoner Review Board, an independent agency which reports to the Governor. (Ill. Rev.

Stats. Ch. 38, § 1003-6-3.) Illinois law requires that appointees to the Prisoner Review Board have at least five years' professional experience in penology or a related area. (Ill. Rev. Stats. Ch. 38, § 1003-3-2(a)(4); see also, Ohio Admin. Code, § 5120-9-09 which also has a tri-level system.)

Major states' experience with administrative appeals from disciplinary hearings thus establishes that inmates' remedies in the administrative arena are adequate. Moreover, many states already provide for broad equitable relief from adverse decisions of prison administrators. This is an important factor, also, in determining claims of absolute quasijudicial immunity. (See Sellars, supra, at p. 1303.) Petitions in error or for writs of habeas corpus offer a simple, flexible means for prisoner access to state courts. (See Cal.



Pen. Code, § 1473 et seq.; Neb. Rev. Stat. § 25-1901 et seq. (Reissue 1979); N.J. Const. (1947) art. VI, § V, ¶ 4.)

In California, the inmate also has potential recourse to all three judicial levels. (Cal. Const., art. 6, § 10.) For example, the California Supreme Court now has pending a state prisoner's habeas corpus action concerning the qualification of a confidential informant in camera. (In re Jackson, Crim. 24237, hg. granted, Dec. 13, 1984.) Jackson had been heard in the trial court and was the subject of a published Court of Appeal decision before the California Supreme Court granted hearing.

In summary, absolute immunity by prison disciplinary officers to damage suits in no way abrogates accountability for such officers' judgments. It simply structures the conflict resolution process so that the inevitable tension between the judge and the

judged can never compromise the judge's independence. (Bradley v. Fisher, 80 U.S. (13 Wall.) 646 (1872).) Just as the aberrant judge is accountable under a judicial misconduct process, the aberrant prison disciplinary hearing officer must account to his or her employer. (See, e.g., Cal. Gov. Code §§ 19572, 19573.) But susceptibility to inmate damage suits under 42 U.S.C. 1983 is a dangerous and ineffective means to accountability.

## CONCLUSION

Absolute immunity for prison disciplinary hearing officers does not reduce their accountability in the process of prison discipline. It merely ensures that the proper channels for decision and complaint are not mixed. Defensiveness by these judges against the judged must not penetrate into the carefully designed process for prison



disciplinary hearings, lest the independence which is essential to that process be lost.

Anything less than absolute immunity will sacrifice that independence, at untold cost to both those who litigate these cases and the court system in which they are litigated.

DATED: May 6, 1985

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
STEVE WHITE, Chief
Assistant Attorney General
ARNOLD OVEROYE
Assistant Attorney General
WILLIAM GEORGE PRAHL
Supervising Deputy
Attorney General

SUSAN J. ORTON
COUNSEL OF RECORD
Deputy Attorney General

Attorneys for Amici Curiae
State of California ex rel.
John K. Van De Kamp,
Attorney General

CHARLES A. GRADDIT
Attorney General
State of Alabama

MICHAEL A. LILLY
Attorney General
State of Hawaii

A. G. McCLINTOCK
Attorney General
State of Wyoming



DECLARATION OF SERVICE BY MAIL

Case Name: CLEAVINGER v. SAXON No. 84-732

I declare that I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, CA 95814.

On May 6, 1985 I served the attached AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA in said cause by placing a true copy thereof enclosed in a sealed envelope thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

G. Flint Taylor
343 South Dearborn, Suite 1607
Chicago, Illinois 60604

Rex E. Lee
Solicitor General of
The United States
10th & Constitution Avenues
Washington, DC 20530

I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on May 6, 1985.
(Date)

D. A. Gale
(Typed Name)

(Signature)